

NO. CV: NHH-CV19-5003875-S

**NYRIEL SMITH,
BY AND THROUGH HER MOTHER
AND LEGAL GUARDIAN
NICHELLE HOBBY;**

**: SUPERIOR COURT/
HOUSING SESSION**

**: JUDICIAL DISTRICT
: OF NEW HAVEN**

**MUHAWENIMANA SARA,
BY AND THROUGH HER FATHER
AND LEGAL GUARDIAN
RUKARA RUGEREZA;**

vs.

CITY OF NEW HAVEN;

**TONI HARP,
IN HER OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF NEW HAVEN;**

**BYRON KENNEDY,
IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF NEW HAVEN
HEALTH DEPARTMENT; AND**

**PAUL KOWALSKI,
IN HIS OFFICAL CAPACITY AS
DIRECTOR OF ENVIRONMENTAL HEALTH,
NEW HAVEN HEALTH DEPARTMENT**

: JUNE 13, 2019

PLAINTIFFS' POST HEARING BRIEF

I. INTRODUCTION

Three year old Nyriel Smith and four year old Muhawenima Sara ("Named Plaintiffs") presently suffer from lead poisoning and hereby seek a preliminary injunction enjoining the City

of New Haven, Mayor Toni Harp, Dr. Byron Kennedy, and Paul Kowalski (“Defendants”) from failing to provide them with critical lead hazards protections, as required by City law, for all children at or under the age of six who have blood lead levels at or above 5 micrograms per deciliter (µg/dL). This case requires extraordinary relief to protect these two young children from the life-long harm that results from the Defendants’ continuing violation of City law. Such relief includes immediate lead hazards inspections of their apartments, abatement orders regarding any lead hazards found, and enforcement of abatement orders to protect them from further lead poisoning. Defendants have refused to provide critical lead hazards protections to these two children, in violation of City law, because they summarily reversed a longstanding Health Department policy and practice to comply with the City law that requires protections for all children with blood lead levels that exceed the Centers for Disease Control and Prevention (“CDC”) reference value of 5 µg/dL. Plaintiffs seek to enjoin this unlawful change in policy and practice as it applies to the Named Plaintiffs.

II. EVIDENCE PRESENTED

The Court held an Order to Show Cause Hearing, on June 7, 2019, at which both parties called witnesses to testify and entered documents into evidence establishing the following undisputed facts:

- The Centers for Disease Control and Prevention (CDC) has, since 2012, used 5 µg/dL as the reference value for lead in the blood of children under six to identify children and environments associated with lead-exposure hazards. See Transcript of Hearing on Order to Show Cause June 7, 2019, Testimony of Dr. Marjorie Rosenthal [“Rosenthal Testimony”] at 105-106; Transcript of Hearing on Order to Show Cause June 7, 2019, Testimony of Dr. Byron Kennedy [“Kennedy Testimony”] at 280; see also Def. Ex. E.

- Yale-New Haven Hospital medical records mark children's blood lead levels at or above 5 µg/dL as "abnormal." See Pl. Exs. 17 and 18.
- The Yale-New Haven Regional Lead Treatment Center uses 5 µg/dL as the standard for an abnormal blood lead level. See Rosenthal Testimony at 110; see also Def. Ex. E.
- The Yale Primary Care Center uses 5 µg/dL as the standard for an abnormal blood lead level. See Rosenthal Testimony at 110.
- Since July 2017, the United States Department of Housing and Urban Development (HUD) has aligned its mandated protections for federally-subsidized tenants with the CDC's reference level, requiring full lead hazards inspections when any child in federally-subsidized housing has a blood lead level at or above 5 µg/dL. See Transcript of Hearing on Order to Show Cause June 7, 2019, Testimony of Evelise Ribeiro at 251-252; see also Pls' Ex. 28; Def. Ex. F.
- In November 2018, Defendants decided that they would no longer conduct lead hazard inspections for children with reported blood lead levels between 5 µg/dL and 19 µg/dL. Since that date, the Health Department has refused to conduct such inspections for children with blood lead levels below 20 µg/dL. See Transcript of Hearing on Order to Show Cause June 7, 2019, Testimony of Jomika Bogan ["Bogan Testimony"] at 154-155; Kennedy Testimony at 211-212, 264.
- The Health Department ceased conducting such inspections because of the costs of the inspections and the reduced number of inspectors available. See Kennedy Testimony at 268-269.
- Mayor Toni Harp was involved in this decision to stop conducting lead inspections for children with blood lead levels between 5 µg/dL and 19 µg/dL through her agent and Community Services Administrator, Dr. Dakibu Mulay. See Kennedy Testimony at 213-214.
- Dr. Byron Kennedy was involved in the decision to no longer conduct inspections for children with blood lead levels below 20 µg/dL. See Kennedy Testimony at 212, 213.
- Defendant Paul Kowalski was involved in the decision to no longer conduct inspections for children with blood level levels below 20 µg/dL. See Kennedy Testimony at 213. Mr. Kowalski instructed inspector Jomeka Bogan to no longer conduct inspections for children with blood lead levels below 20 µg/dL. See Bogan Testimony at 154-55.
- Prior to November 2018, the Health Department was notified of the Named Plaintiffs' blood lead levels by the State Department of Public Health (DPH) and opened files to conduct full lead hazards inspections to protect these children. See Bogan Testimony at 173, 177 (Nyriel) and 184, 187-188 (Sara); Pl. Ex. 20 (DPH report received by the Health

Department on 8/30/18 regarding Nyriel); Pl. Ex. 21 (Health Department file case progress report regarding Nyriel); Pl. Ex. 23 (DPH report received by Health Department on 2/27/18 regarding Sara), Pl. Ex. 22 (Health Department file case progress report regarding Sara).

- After opening files and seeking to do full lead hazards inspections for Nyriel and Sara, the Health Department ceased conducting such inspections for children with EBLs under 20 µg/dL and closed its files for Sara and Nyriel notwithstanding that both girls still had EBLs above 5 µg/dL. See Bogan Testimony at 177 (Nyriel) and 191-192 (Sara); Pl. Ex. 21 (Health Department file case progress report notation that Nyriel's case closed with no inspection), Pl. Ex. 22 (Health Department file case progress report notation that Sara's case closed with no inspection).
- Defendants have not conducted lead hazards inspections of Nyriel and Sara's apartments and have no intentions to do so unless the girls' blood lead levels rise to at least 20 µg/dL. See Bogan Testimony at 154-155, 177; Kennedy Testimony at 211-212.
- Nyriel and Sara both live in apartments built before 1978, the year in which lead paint became illegal. See Pl. Ex. 1 (vision appraisal record stating that the premises was built in 1900); Pl. Ex. 9 (same).
- Nyriel Smith's apartment has peeling, chipping and flaking paint throughout the exterior and interior of the unit. See Pl. Ex. 3 and 4 (photos of the columns on the front porch); Pl. Ex. 5 (photo of the exterior front door frame); Pl. Ex. 6 (photo of interior door frame); Pl. Ex. 7 (photo of interior window frame).
- Muhawenimana Sara's apartment has peeling, chipping and flaking paint throughout the exterior and interior of unit. See Pl. Ex. 10 (photo of kick plate under exterior front door); Pl. Ex. 11 (photo of lower portion of exterior of building); Pl. Ex. 12 (photo of interior front door frame); Pl. Ex. 13 (photo of door frame and floorboard in Sara's playroom); Pl. Ex. 14 (photo of interior window sill over Sara's bed); Pl. Ex. 15 and 16 (photos of interior window sills in Sara's playroom).
- Neither child had an elevated blood lead level at the time that she first moved into her apartment. See Transcript of Hearing on Order to Show Cause June 7, 2019, Testimony of Nichelle Hobby ["Hobby Testimony"] at 31; Transcript of Hearing on Order to Show Cause June 7, 2019, Testimony of Rukara Rugereza ["Rugereza Testimony"] at 58; Pl. Ex. 17; Pl. Ex. 19.
- Nyriel presently suffers from cognitive disabilities. She qualifies for Birth to Three services which require assessment of physical and cognitive abilities by two professionals who must find significant delays for a child to be eligible. See Hobby Testimony at 43; see also <https://www.birth23.org/referral/eligibility/evaluation-and-assessment/>.

- Sara presently suffers from cognitive disabilities. Her father has observed speech delays in his young daughter. See Rugereza Testimony at 74-75.

III. ARGUMENT: THE COURT SHOULD ENTER A PRELIMINARY INJUNCTION ENJOINING THE DEFENDANTS FROM FAILING TO INSPECT, ORDER ABATEMENT, AND ENSURE ABATEMENT OF ANY LEAD HAZARDS FOUND IN THE APARTMENTS OF THE NAMED PLAINTIFFS

A. Legal Standards for Preliminary Injunction

The granting of a preliminary injunction is committed to the discretion of the Court, and the standard for such an action is well settled. A party seeking injunctive relief must demonstrate that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm without an injunction; and (3) the balance of equities tips in its favor. See Waterbury Teachers Assn. v. Freedom of Information Commission, 230 Conn. 441, 446 (1994); Aqleh v. Cadlerock Joint Venture II, L.P., 299 Conn. 84, 97–98 (2010).

The principal purpose of a preliminary injunction is to preserve the status quo until the rights of parties can be finally determined after a hearing on the merits. See Olcott v. Pendleton, 128 Conn. 292, 295 (1941). Here, the status quo is the policy and practice of the Defendants as it existed prior to November 2018. At the hearing, there was undisputed testimony that, prior to November 2018, Defendants provided full lead hazards protections, including full lead hazards inspections of interior and exterior house paint, water, and soil, for all children ages six and under with EBLs at or above 5 µg/dL. In November 2018, the Defendants changed their policy and practice, with no public notice or opportunity for public comment prior to implementation of the change, such that they no longer provide lead hazards protections for children unless such child has an EBL at or above 20 µg/dL. As such, Named Plaintiffs seek to return to the status

quo, as it existed prior to November 2018, with a judicial order to commence immediate lead hazards inspections of their apartments.

(1) Likelihood of success on the merits

The Named Plaintiffs are more than likely to succeed on the merits of the underlying action. Regarding Count One, Defendants have violated the requirements of New Haven General Ordinances regarding mandatory lead hazards protections for all children who are lead poisoned under the definition set by City law. Regarding Counts Two and Three, the Defendants' decision to cease conducting lead hazards inspections for children with EBLs between 5 µg/dL and 19 µg/dL constitutes a usurpment of the Board of Alders' legislative authority. Regarding Count Four, Defendants' decision to change their policy and practice to weaken the childhood lead hazards protection policy and practice, without any public notice or opportunity for public comment, violates the New Haven City Charter.

Count One: Defendants' Decision to Not Provide Mandatory Lead Poisoning Protections for Children with EBLs at or above 5 µg/dL Violates City Law

Defendants are violating New Haven General Ordinances which require that the Defendants be fundamentally responsible to provide full lead poisoning protections for any New Haven child at or under the age of six who has a confirmed venous blood lead level at or above 5 µg/dL. This critical public health obligation includes lead hazards inspections, abatement orders of lead hazards found, and an obligation to enforce abatement orders. Defendants claim that the City law applies to children with EBLs of 20 µg/dL or higher only. This is simply false.

The Code of the City of New Haven, Article III, Section 16-61(g) first sets forth what constitutes a health hazard, by defining lead poisoning as “a blood lead concentration equal to or

greater than twenty (20) micrograms per deciliter of whole blood, or any other abnormal body burden of lead as defined by the Centers for Disease Control and Prevention.” This definition is followed by a mandate in Section 16-64 that the Health Director shall issue orders to the owner of any premises to eliminate such health hazards (i.e., “lead poisoning”) when “the presence of lead paint upon or in any premises creates a health hazard to children.” Sections 16-65 and 16-66 then clarify that the order must be based on a “determin[ation] that the presence of lead paint upon any interior or exterior premises” is the source of the health hazard (i.e., an inspection) and that such order must set forth “a statement of the detected violations” (i.e., the results of the inspection). Although the ordinance does not specify the methods of the lead hazards inspection, the parties agree that an inspection involves certain commonly accepted methods, as set forth in state law, including dust wipes of the interior of the unit and common areas and XRF analysis of the interior of the unit and the exterior of the building, as well as laboratory analysis of water and soil samples. See Bogan Testimony at 147-149.

The Named Plaintiffs seek a preliminary injunction to enjoin Defendants from failing to provide these full lead protections, as set forth in Sections 16-64, 16-65, and 16-66, for the two Named Plaintiffs who fall within the definition of lead poisoning as set forth in Section 16-61. Since November 2018, Defendants changed their policy and practice to provide such protections to children with EBLs of 20 µg/dL only, based on a specious reading of the definition of lead poisoning, as set forth in the ordinance. As explained herein, the plain language of the ordinance, expert testimony, and prior practice of the Defendants all establish that the definition of “lead poisoning” as set forth in the ordinance includes children with elevated blood lead levels starting at or above 5 µg/dL.

First, the plain language of Section 16-61 states the City's lead poisoning protection laws apply to all children with: (a) "a blood lead concentration equal to or greater than twenty (20) micrograms per deciliter of whole blood," which is the state standard for full lead protections, see Conn. Gen. Stat. Sec. 19a-111 "or" (b) "any other abnormal body burden of lead as defined by the Centers for Disease Control and Prevention" which is the CDC's reference value of 5 µg/dL for children six years or younger, see <https://www.cdc.gov/nceh/lead/data/definitions.htm>; https://www.cdc.gov/nceh/lead/acclpp/cdc_response_lead_exposure_recs.pdf (explaining that the reference value of 5 µg/dL is based on the 97.5th percentile of the most recent National Health and Nutrition Examination Survey (NHANES) of blood lead distribution in children, thus deeming this level "abnormal"); see also Def. Ex. A (citing as reference Advisory Committee for Lead Poisoning Prevention 2012, "Low Level Exposure Harms Children: A Renewed Call for Primary Prevention.").

Second, prior judicial precedent sets forth that the phrase "abnormal body burden as defined by the CDC" means the CDC's EBL reference value of 5 µg/dL. In five different cases, three different Superior Court judges have issued orders under City law for children with EBLs of 5 µg/dL or greater based on City law. See Juanita Sumler v. Mt. Bethel Missionary Baptist Church, NHH-CV-17-5001853 (Avallone, A.); Jacob Guaman v. City of New Haven, et al., NHH-CV-17-5040434 (Ozalis, S.); Elijah Hall v. City of New Haven, et al., NHH-CV-18-5003008 (Avallone, A.); T.J. Mims v. City of New Haven et al., NHH-CV-18-5003044 (Spader, W.); Soliman v. Mohammed, NHH-CV-18-5002790 (Avallone, A.). None of these children had EBLs of 20 µg/dL.

Third, the only expert to testify at the hearing, Dr. Marjorie Rosenthal, testified that "abnormal body burden of lead as defined by the Centers for Disease Control" necessarily means

the CDC reference value of 5 µg/dL. See Rosenthal Testimony at 110. Dr. Rosenthal testified that “abnormal body burden of lead” is a blood lead level given that blood is the only body system that can be safely and non-invasively tested in children. See Rosenthal Testimony at 136-138. She testified that, while lead can be found in other parts of children’s bodies such as brains and bones, there is no medically established pediatric practice of testing lead anywhere other than in the blood of children. See Rosenthal Testimony at 136-138. Defendant Byron Kennedy, also a medical doctor, did not disagree. See Kennedy Testimony at 262 (stating that the Health Department does not have any information on abnormal body burdens in body systems other than blood). Dr. Rosenthal testified that the Yale-New Haven Hospital medical reports flag pediatric blood lead levels at or above 5 µg/dL as “abnormal” for treatment purposes and that both the Yale-New Haven Hospital Primary Care Clinic and the Yale Lead Clinic treat 5 µg/dL as the standard for diagnosing lead poisoning. See Rosenthal Testimony at 141.

Fourth, the past practices of the Health Department establish that 5 µg/dL satisfies the City law definition of lead poisoning. The undisputed testimony of Jomeka Bogan sets forth that: (a) prior to November 2018, the Health Department initiated lead hazards inspections when it received information from the State Department of Public Health that a child under the age of six had tested with an EBL at or above 5 µg/dL; (b) that a lead hazards inspection included testing of water, soil, and exterior and interior paint using both dust wipes and XRF technology; (c) if lead paint hazards were determined, the City issued orders to owners to abate the identified lead hazards; (d) that the orders were issued with specific citation to City law; (e) she applied for the issuance of arrest warrants in the event an owner failed to comply with the abatement order with citation to City law; (f) and that the state prosecutor charged and prosecuted owners for violation of the City law. See Bogan Testimony at 153, 165-167, 168-170. A copy of such

orders with citation to City law was entered into evidence. See Pl. Ex. 19 (references to Sections 55-63, 55-64 (a), (b), (c) in the exhibit refer to identical City law now codified as Sections 16-63 and 16-64 (1), (2), and (3)). These commonly used order forms state on page 4 that “[t]he Director of Health had determined that the presence of . . . lead based paint and chipping an flaking paint constitutes health hazards” and state on page 5 that the “order is made pursuant to the authority vested in the Director of Health by . . . Section 55-64 of the New Haven Code of Ordinances” and that “failure to comply with the above stated orders will subject [the owner] to prosecution as provided in . . . City of New Haven Code of Ordinances”.

Defendants did not contradict the above, but rather focused on irrelevant evidence and unpersuasive testimony. In response to the undisputed testimony that the CDC has set a reference value of 5 µg/dL, Defendants produced a document from the CDC which provides a summary of recommendations for follow-up case management of children based on confirmed blood lead levels. This document is not relevant to the present case. The document refers to actions recommended by the CDC, not the standard of action required by City law. The document specifically states that environmental investigation requirements vary based on local jurisdictional requirements.¹ Further to the extent to which Defendants might have hoped to rely on this document to justify their decision to make no home visits and do no lead inspections for children with EBLs below 20 µg/dL, the City is not even following the recommendations of this document which includes environmental assessments to identify potential sources of lead

¹ Defendants cannot be heard to suggest that the federal Centers for Disease Control does not consider full lead inspections of homes for lead hazards to be medically necessary or appropriate for children under the age of six with EBLs at or above 5 µg/dL given that the federal government requires such inspections of federally-subsidized housing, of which there are thousands of units in New Haven, albeit by public housing authorities, based on the CDC reference value. See Testimony of Evelise Ribeiro; Pl. Ex. 28; Def. Ex. F.

exposure for children with EBLs between 5 µg/dL – 9 µg/dL and a home visit to identify potential sources of lead exposure for children with EBLs between 10 – 19 µg/dL. Defendants are taking no such action. The parents of both Named Plaintiffs testified that that have had no contact, counseling, nor home visits by the Health Department. See Hobby Testimony at 42; Rugereza Testimony at 73.

In response to Dr. Rosenthal’s expert testimony regarding the ordinance’s definition of lead poisoning, Defendant Kennedy set forth a tortured interpretation of the City law. He argued that the ordinance definition contains two parts: the first part is a standard based on blood lead levels and the second part is a standard based on body burdens found in body systems other than blood such as brain or bones. See Kennedy Testimony at 261. This argument is specious. Dr. Rosenthal and Dr. Kennedy agreed that there is no appropriate medical test for pediatric body burdens in any body system other than blood. See Rosenthal Testimony at 136-137; Kennedy Testimony at 262-263. To test a body burden in the bone or brain would require an invasive biopsy with risk of harm to the child. Dr. Kennedy concurred that blood lead levels are the only appropriate way to determine body burdens of lead; yet, he opined that the second part of the standard, which was added to the City law almost twenty years ago, exists for the hypothetical possibility that the medical community may one day have the capacity to do non-invasive testing of other body burdens and that the CDC might then one day set a reference level for such abnormal body burdens based on such technological advances. See Kennedy Testimony at 262-263. Dr. Kennedy’s testimony defies logic and foundational principles of statutory construction law which favor rational and sensible statutory construction.²

² See 2A Sutherland, Statutory Construction (4th Ed.) § 45.12; see also Citerella v. United Illuminating Co., 158 Conn. 600, 609, 266 A.2d 382 (1969); State v. Campbell, 180 Conn. 557,

Moreover, Dr. Kennedy's statutory interpretation also defies the undisputed facts that: the CDC has no reference value for abnormal body burden in any body system other than blood, see Kennedy Testimony at 284-285; the entire New Haven medical community uses blood lead levels as the only reference value for pediatric lead poisoning, see Rosenthal Testimony at 141; and testing of body systems other than blood should not be necessary because blood is a subset of all potential areas of a child's body that could be burdened with lead such that if a child has an elevated blood level of 5 µg/dL, that child by definition has an abnormal body burden of lead that could only be rendered more abnormal by further hypothetical testing, see Kennedy Testimony at 260-261, 281.

Counts Two and Three: Defendants' Decision to Cease Providing Full Lead Hazards Protections for Children with EBLs Between 5 µg/dL and 19 µg/dL Constitutes a Usurpment of City Legislative Authority.

Named Plaintiffs are likely to succeed on the merits of their two claims, as set forth in Counts Two and Three, that the Defendants violated the separation of powers set for in the New Haven City Charter. The Charter of the City of New Haven ("Charter") establishes the authority of the distinct branches of City government, with the Board of Alders as the sole legislative body and the Mayor with no authority to legislate or enact new City law. See New Haven City Charter, Article IV(4)(B)(12) and Article III(1)(A) and (2)(A) and (2)(B). The City Charter also establishes that the Department of Health has the authority to perform duties and take such other measures for the prevention of disease and the preservation of

563, 429 A.2d 960 (1980). In other words, "[w]hen two constructions are possible, courts will adopt the one which makes the [ordinance] effective and workable, and not one which leads to difficult and possibly bizarre results." Muller v. Town Plan & Zoning Commission, 145 Conn. 325, 331, 142 A.2d 524 (1958); Milano v. Warden, 166 Conn. 178, 187, 348 A.2d 590 (1974).

public health as provided by the City ordinances only, not to enact or change law. See Charter Article IV(15)(C)(3).

As set forth in the testimony, prior to November 2018, Defendants ensured that the City and the Department of Health complied with the New Haven City Ordinance Title III, Sections 16-61 et seq., commencing full lead hazards inspections for all children age six or younger with reported EBLs at or above 5 µg/dL and enforcing abatement of any lead hazards found. The testimony described above established that the Defendant Mayor, Defendant Kennedy, and Defendant Kowalski were each involved in a decision, either directly or through their agents, to allow the Health Department to stop inspecting the homes of children with blood lead levels at or above 5 µg/dL. This decision so conclusively abrogates existing City law that it has the purpose and effect of an enactment of new law. By exceeding the limitations of their executive powers, and acting in a legislative capacity, Defendants have violated the New Haven City Charter.

Count Four: Defendants' Decision to Change the Health Department's Lead Inspection Rule Without Any Notice or Public Comment Violates the City Charter

Named Plaintiffs are also likely to succeed on the merits of their claim that Defendants failed to provide notice and public comment as required by the City Charter prior to changing its policy and practice. The Charter of the City of New Haven states that the Board of Public Health, on the recommendation of the Director of Public Health, shall have the power to adopt rules but only when such rules or regulations have been vetted through Public Notice on at least four (4) separate occasions. See New Haven City Charter, Article III (3)(I)(3).

For many years, and until November 2018, Defendants had a lead hazards rule that required the commencement of full lead hazards inspections for all children age six and younger with reported EBLs of 5 µg/dL or higher, followed by abatement orders and enforcement of abatement orders of any lead hazards found. The testimony established that there has never been any notice, nor opportunity for public comment, prior to the change in this policy in November 2018, nor any through the present day. See Bogan Testimony at 203-204; Kennedy Testimony at 212-213. To the extent that Defendants' decision to conduct inspections for children who have blood lead levels in accordance with the state standard of 20 µg/dL is construed as a modification of an existing rule within the regulatory authority of the Department of Health, the Department of Health would be required to submit such rule change to notice and public comment as required by the City Charter. It did not and, accordingly, Defendants violated the City Charter by summarily changing its policy and practice on lead hazards protections.

(2) Irreparable Injury to the Plaintiffs for Which There is No Adequate Remedy at Law.

The irreparable harm caused to children under the age of six from elevated blood lead levels is neither disputed nor disputable. Moreover, the harm has no adequate remedy at law. Defendants' own Exhibit E establishes this harm, explaining that the CDC reference value of 5 µg/dL is set based on "compelling evidence that IQ deficits, attention-related behaviors and poor academic achievement are associated with low blood lead levels." Defendant's Exhibit E also clarifies that, when the CDC established this new reference level in 2012, the Connecticut State Department of Public Health concurred with the finding of medical harm at blood lead levels as low as 5 µg/dL, citing a Connecticut study entitled, "The Impact of Early Childhood

Lead Exposure on Educational Test Performance among Connecticut Schoolchildren.”

Defendants’ Exhibit A also cites as a reference the Advisory Committee for Lead Poisoning Prevention 2012 report, entitled, “Low Level Exposure Harms Children: A Renewed Call for Primary Prevention,” which states, “Protecting children from exposure to lead is important to lifelong good health. No safe blood lead level in children has been identified. Even low levels of lead in blood have been shown to affect IQ, ability to pay attention, and academic achievement. And effects of lead exposure cannot be corrected.”

Dr. Marjorie Rosenthal testified about the harm to children from lead poisoning: “[T]he CDC is very clear that . . . any amount of lead in the human body is unsafe and potentially poisonous and . . . creates increased risk for that individual in terms of health specifically around cognitive issues, behavior and development issues, and social/emotional issues.” See Rosenthal Testimony at 107. She added that “a decreased IQ is associated with increased lead levels. Specifically, between 5 and 10 micrograms per deciliter . . . as those numbers climb, it disproportionately decreases the likelihood of one’s increasing IQ.” See Rosenthal Testimony at 108. Echoing the CDC, she stated that the child with a blood lead level at or above 5 µg/dL needs to be removed “quickly” from the lead hazard. See Rosenthal Testimony at 108. Defendant Kennedy similarly testified to his own professional publication entitled, “Declines in Elevated Blood Lead Levels Among Children, 1997-2011,” in which he states that there is no safe level of lead for children and that the threshold level of concern is set at 5 µg/dL based on risk factors for adverse health effects that include irreversible neurobehavioral deficits. See Kennedy Testimony at 280.

The Defendants called only one witness, Sherrine Drummond, a case manager for the New Haven region for the State Department of Public Health Lead Program. Ms. Drummond is

neither a physician nor was she qualified as an expert at the hearing. She testified that the State provides full lead protections for children with EBLs at or over 20 µg/dL. Such testimony is not relevant here as it does not apply to the mandate of City law and by no means establishes a lack of irreparable harm from blood lead levels of 5 – 20 µg/dL. Ms. Drummond stated that the State allows cities to institute more protective standards and that both New Haven and Bridgeport had chosen to do so. See Transcript of Hearing on Order to Show Cause June 7, 2019, Testimony of Sherrine Drummond at 242.

(3) The Balance of Hardships Tips Decidedly in Favor of Plaintiffs

In addition to their argument for the likelihood of success on the merits and the presence of irreparable injury, the Named Plaintiffs can also establish that the balance of hardships tips decidedly in their favor. To grant a preliminary injunction, this Court must weigh the harm to the respective parties and to any public interests that may be affected by the entry or failure to enter injunctive relief. See Griffin Hospital v. Commission on Hospital and Health Care, 196 Conn. 451, 457 (1985), citing Olcott v. Pendleton, 128 Conn. 292, 295 (1941).

Plaintiffs seek only Defendants' compliance with City law, a requirement to protect vulnerable children from life-long harm from pediatric lead poisoning. A city's failure to follow its own laws, the state Constitution, and its Charter cannot possibly be said to serve a public interest. This is particularly true where, as here, the City's change in policy and practice has put the Named Plaintiffs at immediate risk for serious and permanent neurological and other harm from its failure to ensure identification and abatement of the source of the children's lead poisoning.

Defendants' sole justification for their non-compliance with City law is the fact that they lack two lead inspectors and profess not to have the money with which to replace them.

However, Defendants cannot be heard to complain of the burden of compliance with their own law as “the expense of complying with the City's own rules is not an excuse for noncompliance.” New Haven Firebird Society v. Board of Fire Commissioners of the City of New Haven, 32 Conn. App. 585, 591 (1993), citing Derby v. Water Resources Commission, 148 Conn. 584, 590 (1961).

Moreover, Defendants’ financial considerations are penny wise and pound foolish. While the cost to the City for additional inspectors to assess the source of the lead poisoning of children with blood lead levels between 5 µg/dL and 19 µg/dL is not inconsequential, the cost of not identifying and removing young children from the source of poisoning is far greater. See Def. Ex. A (citing as reference American Academy of Pediatrics, 2016, “Prevention of Childhood Lead Toxicity,” which states, “Despite the historical reductions in blood lead concentrations, it has been estimated that the annual cost of childhood lead exposure in the United States is \$50 billion. For every \$1 invested to reduce lead hazards in housing units, society would benefit by an estimated \$17 to \$221, a cost–benefit ratio that is comparable with the cost–benefit ratio for childhood vaccines.”).

IV. CONCLUSION

For the foregoing reasons, the Named Plaintiffs respectfully request that the Court grant the Preliminary Injunction.

THE PLAINTIFFS,
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CERTIFICATION

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